

No. PD-711-17

MARIAN FRASER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

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§

IN THE COURT OF
COURT OF CRIMINAL APPEALS
10/25/2017
DEANA WILLIAMSON, CLERK

CRIMINAL APPEALS

OF TEXAS

**APPELLANT'S MOTION FOR
REASONABLE BAIL PENDING APPEAL**

Appellant, MARIAN FRASER, asks the Court to set reasonable bail pending appeal as required by article 44.04(h) of the Code of Criminal Procedure.

A. BACKGROUND

1. Appellant is Marian Fraser.
2. A jury convicted Fraser of felony murder and assessed her punishment at fifty years' imprisonment and a \$10,000 fine.
3. The Amarillo Court of Appeals reversed the conviction and remanded the case for a new trial. *Fraser v. State*, No. 07-05-00267-CR, 2017 WL 2536861 (Tex. App. – Amarillo June 9, 2017, pet. filed).
4. The State timely filed a petition for discretionary review in the above-styled and numbered cause, and Fraser timely filed a cross-PDR.

B. RELEVANT AUTHORITIES

5. “If a conviction is reversed by a decision of a Court of Appeals, the defendant, if in custody, is entitled to release on reasonable bail, **regardless of the length of term of imprisonment**, pending final determination of an appeal by the state or the defendant on a motion for discretionary review.” TEX. CODE CRIM. PROC. art. 44.04(h) (emphasis added).

6. Because Fraser is requesting bail after the PDR has been filed, article 44.04(h) requires this Court to determine the amount of bail. *Id.*

7. This Court has established a number of non-exclusive factors to be considered in setting bail under article 44.04(h), including:

- a. Nature of offense;
- b. Ability to make bail;
- c. Prior criminal record;
- d. Conformity with previous bond conditions;
- e. Employment record;
- f. Family ties to community;
- g. Length of residence in community;

Montalvo v. State, 786 S.W.2d 710, 711 (Tex. Crim. App. 1989) (per curiam).

8. Fraser asks the Court to set reasonable bail as required by article 44.04(h) and addresses the relevant factors discussed in *Montalvo* below.

C. MONTALVO FACTORS

9. Fraser asks the Court to reinstate the amount of pretrial bail set at \$25,000 by the trial court after considering all relevant factors. (CR 9) The discussion below of the evidence and information relevant to the *Montalvo* factors demonstrates that \$25,000 is a reasonable bail under the unique circumstances of this case.

A. A jury convicted Fraser of felony murder following the tragic death of a young child in her in-home day care. *See Fraser*, 2017 WL 2536861, at *1-2. The jury essentially found that the child died from ingesting diphenhydramine while in Fraser's care. *Id.*

B. The trial court has determined Fraser to be indigent for purposes of appeal. (CR 134) But the family has the financial resources to make bail of as much as \$50,000. *See Affidavit of Logan Fraser in Support of Motion for Reasonable Bail Pending Appeal*, attached as Exhibit "A" and incorporated herein by reference. ("Logan Fraser Affidavit")

C. Fraser has no prior criminal history. *See Logan Fraser Affidavit*.

D. The trial court established as specific conditions of pretrial bond that Fraser: (1) "not directly or indirectly communicate with any child (children) under the age of eighteen (18)" and (2) "not directly or indirectly communicate with or attempt to communicate with the individual or individuals, who may be witnesses or potential witnesses in the trial of this case, or go within sight of their residences,

schools, churches, or places of employment.” (CR 12) Fraser fully complied with the conditions of her pretrial bond. She attended court whenever her case was set and she scrupulously adhered to the other conditions of bond mentioned above. *See Logan Fraser Affidavit.*

E. Fraser was self-employed for 25 years operating an in-home day care. The tragic events that led to her arrest and prosecution and her conditions of bond prevented her from continuing to pursue this occupation. While the case was pending, she maintained employment with Another Season – a locally owned consignment store in Waco. *See Logan Fraser Affidavit.*

F. Fraser has lived in Waco for 30 years. She has been married for 26 years to Gary Fraser who has 4 sons from a previous marriage. Gary and Marian Fraser have one child together – their daughter Logan. Gary and Marian Fraser have lived in the same house in Waco for 20 years. Before Marian Fraser’s arrest, she was an active member of Lakewood Christian Church in Waco where Gary is still attending. They have been members of this church for 19 years. The members of the church continue to support Marian Fraser to this day. *See Logan Fraser Affidavit.*

G. Fraser’s husband Gary and a niece live in Waco. Marian remains close to her 3 brothers and corresponds frequently with her 6 adult nieces and nephews. *See Logan Fraser Affidavit.*

10. The circumstances of the offense are atypical for a murder prosecution. Fraser has been prohibited from being around children and closed her in-home day care because of the tragic events that led to her arrest and prosecution. Accordingly, Fraser poses no threat to children similarly situated to the child for whose death she was prosecuted (or other children).

And Fraser has no prior criminal history or anything in her past to suggest she is a violent person or poses a threat to the community.

11. Fraser has lived in the same community for 3 decades and has been married to her husband for nearly as long. They have long been active in the Waco community primarily through their church.

12. Fraser scrupulously complied with her conditions of pretrial bond and appeared in court whenever required.

13. Consideration of the *Montalvo* factors indicates that reinstatement of the pretrial bail set by the trial court at \$25,000 is reasonable under the unique circumstances of this case.

14. The Fourteenth Court of Appeals has held that the “primary factors” to be considered after reversal are: “(1) the fact that the conviction has been overturned; (2) the State’s ability, if any, to retry the appellant; and (3) the likelihood that the decision of the court of appeals will be overturned.” *Aviles v. State*, 26 S.W.3d 696, 699 (Tex. App.—Houston [14th Dist.] 2000, order). Fraser suggests that these factors are not particularly helpful in determining a reasonable bail because the primary purpose of bail, whether pretrial or posttrial, “is to secure the presence of the accused.”

Werner v. State, 445 S.W.3d 301, 305 (Tex. App.—Houston [1st Dist.] 2013, order) (quoting *Aviles*, 26 S.W.3d at 698).

A. The fact that the conviction has been overturned means only that the appellant is again going to face the possibility of a trial—which is nearly the same as the appellant’s position was before the first trial. See *Werner*, 445 S.W.3d at 306. The *Montalvo* factors adequately address considerations relevant to ensuring the presence of the appellant at any subsequent proceedings. The First Court of Appeals questioned the significance of a conviction being overturned to the issue of bail. *Id.* at 305 (“we find no particular significance in our overturning appellant’s conviction as it applies to setting bail”).

B. The likelihood of retrial may be an important consideration if the State appears unlikely to retry the appellant. In that instance, a lower bail would be appropriate. Here, all indications are that the State will retry Fraser. Again, the *Montalvo* factors are adequate. *Cf. id.*

C. Finally, neither the court of appeals nor this Court should engage in conjecture regarding whether the decision of the court of appeals is likely to be overturned. Courts of appeals are consistently hesitant to do so. *E.g., id.* (“We share our sister courts’ hesitation in predicting the Court of Criminal Appeals’s future disposition.”). And for this Court to predict the outcome in any manner would be to encourage an advisory opinion which is constitutionally prohibited.

15. The First Court essentially reinstated the appellant’s pretrial bail in *Werner*. See *id.* at 306. Fraser suggests that this Court should do likewise in her case.

16. For each of the reasons discussed, Appellant Marian Fraser prays that the Court: (1) set reasonable bail in the amount of \$25,000 or such other

amount the Court deems appropriate; (2) direct the trial court to impose any conditions of bond and approve any sureties for a bond in the amount set by this Court; and (3) grant such other relief to which she may show herself justly entitled.

Respectfully submitted,

/s/ Alan Bennett

E. Alan Bennett
Counsel for Appellant
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of this document has been served by e-service on October 25, 2017 to: (1) counsel for the State, Debra Windsor, CCAappellatealerts@tarrantcountytexas.gov; and (2) the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Alan Bennett
E. Alan Bennett

No. PD-711-17

MARIAN FRASER,	§	IN THE COURT OF
Appellant	§	
	§	
v.	§	CRIMINAL APPEALS
	§	
THE STATE OF TEXAS,	§	
Appellee	§	OF TEXAS

**AFFIDAVIT OF LOGAN FRASER IN SUPPORT OF
MOTION FOR REASONABLE BAIL PENDING APPEAL**

STATE OF TEXAS §
 §
COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, on this day personally appeared LOGAN FRASER, the affiant, whose identity is known to me. After I administered an oath, affiant testified as follows:

1. “My name is LOGAN FRASER. I am over 18 years of age, of sound mind, and capable of making this affidavit. The facts stated herein are within my personal knowledge and true and correct.

2. The Appellant MARIAN FRASER is my mother.

3. “I am currently a resident of Fort Worth, Tarrant County, Texas, where I attend Brite Divinity School at Texas Christian University. I was born and raised in Waco, McLennan County, Texas.

4. “Pretrial bail in this case was set at \$25,000 with certain conditions of bond, primarily, that Marian Fraser not communicate with children under 18 years of age or with witnesses or potential witnesses. Our family could afford to post bail in a similar amount or perhaps

EXHIBIT "A"

as much as twice that amount. Marian Fraser would agree to continue to abide by those conditions of bond or other reasonable conditions of bond imposed by the trial court or this Court.

5. "Marian Fraser has no other criminal history besides these charges.

6. "Marian Fraser fully complied with the conditions of her pretrial bond. She attended court whenever her case was set and she scrupulously adhered to the other conditions of bond mentioned above.

7. "Marian Fraser was self-employed for 25 years operating an in-home day care. The tragic events that led to her arrest and prosecution and her conditions of bond prevented her from continuing to pursue this occupation. While the case was pending, she maintained employment with Another Season—a locally owned consignment store in Waco.

8. "Marian Fraser was born on October 19, 1963. She was raised in Clifton, Bosque County, Texas but has lived in Waco for 30 years. She has been married for 26 years to Gary Fraser who has 4 sons from a previous marriage. I was the only child born to Gary and Marian Fraser. Gary and Marian Fraser have lived in the same house in Waco for 20 years. Before Marian Fraser's arrest, she was an active member of Lakewood Christian Church in Waco where Gary is still attending. They have been members of this church for 19 years. The members of the church continue to support Marian Fraser to this day.

9. "Presently, Marian Fraser's husband and a niece live in Waco. Marian Fraser remains close to her 3 brothers and corresponds frequently with her 6 adult nieces and nephews."


LOGAN FRASER, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of October, 2017.

Kathleen A. Winter
NOTARY PUBLIC, STATE OF TEXAS

